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To Cap or Not to Cap Damage Awards: That is the Constitutional Question

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TO CAP OR NOT TO CAP DAMAGE AWARDS: THAT IS THE CONSTITUTIONAL QUESTION

I. INTRODUCTION 519
A. *The Equal Protection Challenge* 521
B. *The Due Process Challenge* 528
C. *The Right Of Access To The Courts Challenge* . 531
D. *The Right To Trial By Jury Challenge* 534
II. CONSTITUTIONAL CHALLENGES IN WEST VIRGINIA 538
A. *Equal Protection And Due Process Challenges In West Virginia* 538
B. *The Right To A Jury Trial Challenge In West Virginia* 543
C. *The Open Courts Challenge In West Virginia* 547
III. CONCLUSION 549

I. INTRODUCTION

In 1986, fourteen million people in the United States filed lawsuits, the cost of which has been estimated to be between thirty and thirty-seven billion dollars.[1] In addition, the dollar amounts awarded to successful plaintiffs are reported to have increased at a rate that far surpasses the rate of inflation.[2] Consequently, a troublesome inflation of liability insurance costs has resulted from which it appears no segment of our society is immune.[3] However, the increase in liability insurance rates has accelerated most rapidly in the medical field.[4]

The Secretary of Health and Human Services for the Reagan administration, Mr. Otis Bowen, released a government study on malpractice which disclosed that insurance premiums for the average

1. Zuckerman, *Tort Reform*, U.S. NEWS & WORLD REP., Sept. 7, 1987, at 68.
2. Willard, *The Time Has Come For Tort Reform*, U.S.A. TODAY, March 1987, at 48.
3. Nonprofit organizations, professionals, businesses and state and local governments across the nation are reported to be paying extravagantly higher insurance premiums. *Id.*
4. P. DANZON, MEDICAL MALPRACTICE (1985).

physician had increased 81% from 1982 to 1985.[5] However, for obstetrics and gynecology, the hardest-hit specialty, insurance premiums increased 113%.[6] As a result, many doctors have shunned procedures that are affiliated with malpractice suits, while others have left the medical profession entirely.[7]

Swayed by escalating liability insurance premiums, numerous states have enacted legislation that alters the traditional common law tort system's approach to personal injuries.[8] State legislative responses have included: limiting the award of damages, eliminating joint and several liability, providing for periodic payments of future economic damages, scheduling contingency fees, and deducting collateral sources of compensation received for the same injury.[9] One of the most prominent issues in the area is the constitutionality of enactments that limit or cap damages in tort cases, particularly in medical malpractice cases.[10]

Numerous states, including West Virginia,[11] have passed legislation which has placed some type of cap on medical malpractice awards.[12] Constitutional challenges to this type of legislation have met with mixed judicial responses for a variety of reasons. One reason for the lack of a consensus among state courts is that the statutes themselves vary considerably.[13] They differ as to the types of damages that are limited and as to the monetary limits that are placed on awards as well. Additionally, the differences among state court decisions have resulted both from diverse judicial views regarding fundamental constitutional protections and from the presence of provisions that are unique to certain state constitutions.[14]

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5. Zuckerman, *supra* note 1, at 68.

6. *Id.*

7. *Id.*

8. Smith, *Medicine and Law: Aids, Constitutional Challenges to Tort Reform and Medical Malpractice*, 23 TORT & INS. L. J. 370 (1988).

9. Freeman, *Tort Law Reform: Superfund/RCRA Liability as a Major Cause of the Insurance Crisis*, 21 TORT & INS. L. J. 517 (1986).

10. Smith, *supra* note 8, at 387.

11. W. VA. CODE § 55-7B-8 (Supp. 1988).

12. Tort Reform Developments, INS. LITIGATION REP., June 1987, at 158 (survey of statutory damage limits for malpractice actions).

13. *Id.* at 159, 160.

14. See *infra* text accompanying notes 108-168.

Statutory caps on damages raise several significant constitutional issues. Similarly, decisions in this area reveal various theories of constitutional challenge. This note examines a number of the constitutional challenges that have been asserted, as well as the possible applicability of these challenges to chapter 55, article 7B, section 8 of the West Virginia Code [hereinafter W. Va. Code] § 55-7B-8. This statute limits liability for noneconomic loss in medical malpractice liability actions.[15]

A. The Equal Protection Challenge

Statutes which place limitations on medical malpractice damages have been scrutinized by courts by means of equal protection challenges.[16] The equal protection clause, which guarantees that similar people will be treated in a similar manner and that people of different circumstances will not be treated as if they were the same,[17] has become the "single most important concept in the Constitution for the protection of individual rights."[18]

Equal protection guarantees that a law does not unconstitutionally discriminate between classifications of persons.[19] Those who challenge the medical malpractice caps under equal protection analysis contend that the caps favor a particular class in some way. First, it is contended that the statutes which cap damages in medical malpractice cases distinguish between medical malpractice tort victims and tort victims in general.[20] Plaintiffs in medical malpractice actions are entitled only to limited recovery while plaintiffs in other actions may receive complete compensation for their injuries.[21] Second, it is asserted that the statutes differentiate between those medical malpractice tort victims whose damages are less than the statutory monetary limit, who may enjoy full recovery, and those whose damages surpass the limit, who are not entitled to full recovery.[22]

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15. W. VA. CODE § 55-7B-8 (Supp. 1988).
16. *See infra* text accompanying notes 17-91.
17. J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 587 (2d ed.1983).
18. *Id.* at 585.
19. *Id.*
20. *See, e.g.*, Boyd v. Bulala, 647 F. Supp. 781, 786 (W.D. Va. 1986).
21. *Id.*
22. *Id.*

Initially, when faced with an equal protection challenge to statutes which set caps on medical malpractice damages, the courts must determine which standard of review to apply. Ultimately, whether a classification can be determined to meet the equal protection guarantee under one of the three levels of review depends upon 1) the purpose which one imputes to the legislative act and 2) the ascertainment of whether there is a sufficient degree of relationship between the asserted governmental end and the classification.[23]

There appears to be a consensus among courts that medical malpractice damage limits should not be subject to the strict scrutiny level of review.[24] Under this standard, courts will not accept every permissible government purpose as sufficient to justify a classification, but will require the government to show that it is pursuing a "compelling" or "overriding" end.[25] Courts apply this strict standard of review when a statute creates a suspect classification or burdens a fundamental right.[26]

Suspect classifications which have triggered the application of the strict scrutiny standard include race,[27] national origin,[28] and alienage.[29] It is clear that tort victims are not a suspect class.[30]

Furthermore, courts have looked to *Munn v. Illinois*[31] for guidance, in which the United States Supreme Court stated that persons have no property or vested interest in any rule of the common law.[32] As a result, those courts have reasoned that individuals cannot claim full recovery in tort as a fundamental right.[33] Therefore, because statutes which cap damages in medical malpractice cases neither create a suspect classification nor infringe upon a fundamental right,

23. Nowak, *supra* note 17, at 590.
24. *See, e.g., Boyd*, 547 F. Supp. at 786, 787.
25. *Id.* at 792.
26. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
27. Brown v. Board of Educ., 347 U.S. 483 (1954).
28. Korematsu v. United States, 323 U.S. 214 (1944).
29. Graham v. Richardson, 403 U.S. 365 (1971).
30. *See, e.g.*, Waggoner v. Gibson, 647 F. Supp. 1102 (N.D. Tex. 1986).
31. Munn v. Illinois, 94 U.S. 113 (1877).
32. *Id.* at 134.
33. *E.g., Boyd*, 647 F. Supp. at 787.

they have not been subjected to strict standards of judicial review.

However, the courts that have ruled on this issue and determined that strict scrutiny is an inappropriate level of review do not agree on whether to apply the rational basis test or some type of intermediate standard of review.[34]

When the rational basis test is applied, courts inquire whether it is plausible that the classification bears a rational relationship to an end of government which is not prohibited by the United States Constitution.[35] As long as the legislature arguably had such a basis for creating the classification, the law will not be invalidated on equal protection grounds.[36] It is important to note that this standard is generally applied to social and economic regulations.[37]

The courts which have applied the rational basis level of scrutiny to caps on medical malpractice damages generally have found that the statutes do not violate equal protection principles.[38] In *Fein v. Permanente Medical Group*,[39] the plaintiff, an attorney who sued a partnership of physicians for failing to diagnose his impending heart attack, challenged the constitutionality of a California statute capping noneconomic damages.[40] The California Supreme Court applied the rational basis standard of review and held that the cap of $250,000 on the recovery of noneconomic damages was rationally related to the legitimate goal of reducing insurance costs.[41]

In *Fein*, the plaintiff alleged that the statutory cap violated equal protection because it discriminated between medical malpractice vic-

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34. The courts in *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978), *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980) and *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980), applied intermediate level scrutiny. The courts in *Fein v. Permanente Medical Groups*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985), *appeal dismissed*, 474 U.S. 892 (1985), *Sibley v. Board of Supervisors*, 462 So. 2d 149 (La. 1985), *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976), *Baptist Hosp. v. Baber*, 672 S.W.2d 296 (Tex. Ct. App. 1984), *Waggoner*, 647 F. Supp. 1102 and *Boyd*, 647 F. Supp. 781, applied the rational basis test.

35. NOWAK, *supra* note 17, at 591.

36. *Id.*

37. *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955); McGowan v. Maryland, 366 U.S. 420 (1961).

38. *See infra* text accompanying notes 39-51.

39. *Fein*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 358.

40. *Id.* at 142, 595 P.2d at 669, 211 Cal. Rptr. at 368.

41. *Id.* at 158, 695 P.2d at 680, 211 Cal. Rptr. at 383.

tims and other tort victims. Likewise, he alleged that it discriminated within the class of medical malpractice victims by denying a "complete" recovery of damages to only those malpractice plaintiffs with noneconomic damages exceeding $250,000.[42] The court disposed of the first contention and held that the statute was rationally related to its legislative purpose, which was a response to the insurance "crisis" in the medical malpractice area.[43]

Additionally, the *Fein* court offered plausible justifications which the legislature might have had for enacting a statute which limits noneconomic damages only in medical malpractice cases. First, the court acknowledged that the wide disparity in large noneconomic jury awards may be reduced.[44] Next, the court stated that an across-the-board limitation may provide a more stable base on which to calculate insurance rates.[45] Third, the court reasoned that a $250,000 limit may promote settlements by eliminating the unknown possibility of phenomenal awards for pain and suffering.[46] Finally, the court concluded that it may be fairer to malpractice plaintiffs in general to only decrease the large noneconomic damage awards.[47]

Likewise, the plaintiff's claim that the statute violated equal protection because of its differential effect within the class of malpractice plaintiffs was found to be without merit.[48] The *Fein* court reasoned that the intended cost savings obtained by limiting the recovery of noneconomic damages provided a reasonable basis for drawing a distinction between economic and noneconomic damages.[49] Furthermore, the court found that a limitation on economic damages was not mandated by the equal protection clause simply because limitations were imposed on damages for noneconomic losses.[50] Thus, based upon the given reasoning, the plaintiff's equal protection challenge to the capping statute failed.

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42. *Id.* at 161, 162, 695 P.2d at 682, 211 Cal. Rptr. at 385.
43. *Id.*
44. *Id.* at 162, 163, 695 P.2d at 683, 211 Cal. Rptr. at 386.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*

Similarly, in *Boyd v. Bulala*,[51] a federal district court applied the rational basis test when it was faced with an equal protection challenge to a Virginia statute which limited total medical malpractice damages to one million dollars.[52] The district court examined equal protection issues under both the state and federal constitutions. It noted that, although the Virginia Constitution contains no equal protection clause, equal protection rights are guaranteed by the document's anti-discriminatory clause[53] and the prohibitions against special legislation.[54]

The court found that the Virginia medical malpractice cap legislation clearly did not create a suspect classification,[55] but noted that it would be subject to strict scrutiny if it infringed upon a fundamental right.[56] However, following the reasoning of *Munn*,[57] the court held that the right to a full recovery in tort is not a fundamental right under the Virginia Constitution.[58] Therefore, since the capping statute neither created a suspect classification nor infringed upon a fundamental right, the court scrutinized the provision under the rational basis test, which is generally applied when reviewing economic regulations.[59] The court found that the cap was a rational means to achieve the legislative goal of securing the continuation of health care services by maintaining the availability of malpractice insurance at affordable rates.[60] Thus, the statute was found to meet the requirements of the state antidiscriminatory clause and the clause against special legislation prohibitions which guarantee equal protection.[61]

An additional level of review that has been applied by courts when examining statutes under an equal protection challenge is the

51. *Boyd*, 647 F. Supp. at 787.
52. VA. CODE § 8.01-581.15 (Repl. Vol. 1984).
53. VA. CONST. art. I, § 11.
54. VA. CONST. art. IV, § 14.
55. *Boyd*, 647 F. Supp. at 786.
56. *Id.* at 787.
57. *Munn*, 94 U.S. at 134.
58. *Boyd*, 647 F. Supp. at 787.
59. *Id.*
60. *Id.*
61. *Id.* at 788.

intermediate level of review. The United States Supreme Court has applied this level of judicial scrutiny to analyze discriminatory state actions based on gender[62] and illegitimacy.[63] To meet this level of review, a classification must be "substantially related" to an "important governmental objective."[64] While this test has not been extended to liability cap challenges by the United States Supreme Court, various state courts have applied it to medical malpractice statutes which limit the amount of damages recoverable.[65]

In *Arneson v. Olson*,[66] the North Dakota Supreme Court held that a statute[67] which capped total damages of medical malpractice claims at $300,000 violated the state and federal guarantee of equal protection.[68] The court applied a standard of review which was more rigorous than the rational basis test but less demanding than the strict scrutiny test.[69] It stated that this intermediate level of review required "a close correspondence between statutory classification and legislative goals."[70] The court utilized this particular test because it was the test employed in a similar case involving the constitutionality of the state's automobile guest statute, which limited recovery in tort for passengers in automobiles.[71]

The *Arneson* court's application of this test resulted in a finding that the statute violated the equal protection provisions of the North Dakota Constitution[72] and the United States Constitution.[73] In its analysis, the court examined the legislative goals behind the enactment and found that the cap was unsuccessful in fulfilling those goals.[74] The statute did not provide adequate compensation to pa-

62. *See* Reed v. Reed, 404 U.S. 71 (1971).
63. *See* Lalli v. Lalli, 439 U.S. 259 (1979).
64. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).
65. *Boyd*, 647 F. Supp. 781.
66. Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).
67. N.D. CENT. CODE § 26-40.1-11 (Repl. Vol. 1978).
68. *Arneson*, 270 N.W.2d at 136.
69. *Id.* at 133.
70. *Id.* (citing Johnson v. Hassett, 217 N.W.2d 771, 775 (N.D. 1974), a case involving the constitutionality of an automobile guest statute).
71. *Id.*
72. *Id.* at 135.
73. *Id.* at 136.
74. *Id.* at 135.

tients with meritorious claims,[75] nor did it aid in the elimination of nonmeritorious claims.[76] The court noted that, although caps on recovery may encourage physicians to practice in the state, such measures did so "at the expense of claimants with meritorious claims."[77] In addition, the *Arneson* court stated that the trial court's finding that there was no insurance crisis in North Dakota was not clearly erroneous.[78]

Similarly, the Supreme Court of New Hampshire, in *Carson v. Maurer*,[79] applied an intermediate level of judicial review in response to an equal protection challenge of an enactment which limited non-economic damages in medical malpractice claims to $250,000.[80] While noting that the medical malpractice statute established several classifications, the *Carson* court held that the statute did not involve a suspect classification, nor did it impinge upon a fundamental right.[81] Thus, the court found that the application of strict judicial scrutiny would be inappropriate.[82] However, the court held that the right to recover for personal injuries was an important substantive right[83] and that any restriction imposed upon that right must be subjected to more rigorous judicial scrutiny than permitted under the rational basis test.[84] While recognizing that the United States Supreme Court had limited its application of this judicial test to cases involving classifications based upon gender and illegitimacy,[85] the New Hampshire Supreme Court noted that it is not confined to federal constitutional standards but, rather, that it is free to grant individuals more rights than the Federal Constitution requires.[86]

Applying a "fair and substantial relation" test, the New Hampshire Supreme Court held that the state's medical malpractice dam-

75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980).
80. N.H. REV. STAT. § 507-C:7 (Repl. Vol. 1983).
81. *Carson*, 120 N.H. at 931, 424 A.2d at 830.
82. *Id.*
83. *Id.* at 931, 932, 424 A.2d at 830.
84. *Id.* at 932, 424 A.2d at 830.
85. *Id.* at 932, 424 A.2d at 831.
86. *Id.*

age limitation unconstitutionally denied equal protection to medical malpractice plaintiffs.[87] The necessary relationship between the legislative goal of reducing malpractice premiums and the statutory cap as the means chosen to attain that goal was found by the *Carson* court as tenuous for two reasons. First, the court stated that "paid-out damage awards constitute only a small part of total insurance premium costs."[88] Next, and more importantly, the court stated that "few individuals suffer noneconomic damages in excess of $250,000."[89] Additionally, the *Carson* court agreed with the North Dakota Supreme Court in its analysis in *Arneson*, stating that such a statute neither provided adequate compensation to plaintiffs with meritorious claims, nor deterred nonmeritorious claims.[90] The court further stated that a tort victim gains nothing from an economic loss award and that only an award above the plaintiff's out-of-pocket loss compensates for the "pain, suffering, physical impairment or disfigurement that the victim must endure until death."[91]

Thus, it is clear that the courts disagree on the proper standard of review to be applied to capping statutes under equal protection challenges. The success of such challenges appears to depend to a great extent upon the level of judicial review that a court may deem appropriate for application in the particular case before it.

B. The Due Process Challenge

When examining statutes which limit damages recoverable in medical malpractice cases under a due process analysis, courts have generally adopted the deferential approach which the United States Supreme Court has employed with regard to economic regulation.[92] The Supreme Court has almost totally abandoned any real scrutiny of economic legislation under substantive due process analysis.[93] Rather, the Court has opted to employ the rational basis test when

87. *Id.* at 943, 424 A.2d at 838.
88. *Id.* at 941, 424 A.2d at 835.
89. *Id.*
90. *Id.* at 941, 424 A.2d at 837.
91. *Id.* at 942, 424 A.2d at 837.
92. *See, e.g., Boyd*, 647 F. Supp. at 787.
93. NOWAK, *supra* note 17, at 448.

reviewing the substance of laws and regulations challenged under the guarantee of due process when the regulation does not involve a fundamental constitutional right, suspect classification, or the characteristics of citizenship, gender or illegitimacy.[94]

For instance, in *Boyd v. Bulala*,[95] the district court held that, although the challenged capping statute violated the constitutional guarantee of right to a civil jury trial, it did not violate constitutional due process guarantees.[96] Because the statute neither infringed upon a fundamental right, nor created a suspect class, it was subjected to the liberal standard of review normally applied to economic regulations under due process analysis.[97] The statute was found to meet the requirements of the due process clause because it was a "rational means to achieve the legislative goal of securing the provision of health care services by maintaining the availability of malpractice insurance at affordable rates."[98]

Several courts, however, have taken their due process analysis of capping statutes beyond the test of whether the statute is rationally related to legitimate state interests and have analyzed the statutes under the due process theory of *quid pro quo*.[99] The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law. . . ."[100] Thus, under the *quid pro quo* theory, legislation which takes away a party's common law right to recovery in tort, which is deemed to be a property right, is unconstitutional if it fails to grant a reciprocal right or benefit to such party.[101]

As justification for such a requirement of a reciprocal right or benefit in cases involving the constitutionality of statutory caps on damages, societal *quid pro quo* arguments have been made. These

94. *Id.* at 449.
95. *Boyd*, 647 F. Supp. 781.
96. *Id.* at 787.
97. *Id.*
98. *Id.*
99. The idea that due process imposes a *quid pro quo* requirement seems to have resulted from *dictum* in *New York Cent. R.R. v. White*, 243 U.S. 188, 201 (1917).
100. U.S. CONST. amend. XIV, § 1.
101. *See, e.g.*, Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399, 406 (1976).

arguments reason that "the loss of recovery potential to some malpractice victims is offset by lower malpractice insurance premiums and lower medical care costs for all recipients of medical care."[102] However, such arguments have been rejected by a number of courts, which have reasoned that lower medical costs for all health care recipients do not adequately compensate the severely injured malpractice plaintiff.[103]

The North Dakota Supreme Court held in *Arneson*[104] that the limitation of recovery did not provide adequate compensation to patients with meritorious claims; rather, it harmfully impeded the rights of the most seriously injured claimants.[105] Likewise, while finding a lack of *quid pro quo* for potential medical malpractice victims, the New Hampshire Supreme Court reasoned in *Carson*[106] that it was "unreasonable and unfair to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."[107] The court reasoned further that the limitation on medical malpractice damages lacks the *quid pro quo* provided by worker's compensation statutes.[108]

Similarly, in *Baptist Hosp. of Southeast Texas v. Baber*,[109] no *quid pro quo* was found. However, the state's medical malpractice cap was found unconstitutional on equal protection grounds.[110] The *Baber* court noted that, although the absence of a *quid pro quo* does not mandate a finding of unconstitutionality, its presence would strengthen the statute's validity.[111]

In contrast, the California Supreme Court stated in *Fein*[112] that "even if due process principles required some '*quid pro quo*' to

102. *See, e.g.*, Wright v. Central DuPage Hosp. Assoc., 63 Ill. 2d 313, 347 N.E.2d 736 (1976).
103. *See infra* text accompanying notes 104-111.
104. *Arneson*, 270 N.W.2d 125.
105. *Id.* at 135.
106. *Carson*, 120 N.H. 925, 424 A.2d 825.
107. *Id.* at 942, 424 A.2d at 837.
108. *Id.* at 943, 424 A.2d at 837.
109. Baptist Hosp. of Southeast Texas v. Baber, 672 S.W.2d 296 (Tex. Ct. App. 1984).
110. *Id.* at 298.
111. *Id.*
112. *Fein*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368.

support the statute, it would be difficult to say that the preservation of a viable medical insurance industry in California was not an adequate benefit for the detriment the legislation imposes on malpractice plaintiffs."[113] Accordingly, the *Fein* court rejected the due process challenge, holding that the statutory cap was rationally related to the objective of reducing the liability of malpractice defendants and their insurers.[114]

The plaintiff in *Fein* appealed from the judgment that the statutory cap was constitutional.[115] The Supreme Court of the United States refused to hear the case on the ground that it did not present a substantial federal question.[116] The denial of *certiorari*, however, contained a noteworthy dissent[117] written by Justice White which addressed a question left unresolved by the Supreme Court in *Duke Power Co. v. Carolina Environmental Study Group*.[118] The question, which Justice White claims is dividing the appellate and highest courts of several states, is "[w]hether due process requires a legislatively enacted compensation scheme to be a *quid pro quo* for the common law or state law remedy it replaces, and if so, [how adequate must it be?]"[119] Justice White noted that the unresolved status of this question is one of the reasons for the division among the state courts concerning the constitutionality of damage caps.[120] Thus, until the United States Supreme Court rules on this issue, the inconsistency among state court decisions is likely to continue.

C. *The Right Of Access To The Courts Challenge*

An additional constitutional challenge to statutory caps which is based upon state constitutional grounds is premised upon guarantees of a certain remedy or right of access to the courts. Thirty-seven state constitutions contain provisions which generally provide that

113. *Id.* at 160 n.18, 695 P.2d at 681-82 n.18, 211 Cal. Rptr. at 385 n.18.
114. *Id.* at 159, 695 P.2d at 680, 211 Cal. Rptr. at 383.
115. *Fein*, 474 U.S. 892.
116. *Id.*
117. *Id.*
118. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978).
119. *Fein*, 474 U.S. at 894, 895.
120. *Id.* at 894.

the courts "shall be open to every person, and a speedy and certain remedy afforded for every wrong and for every injury to person, property or reputation."[121]

In *Smith v. Department of Insurance*,[122] the Florida Supreme Court ruled on the constitutionality of the Florida Tort Reform and Insurance Act. One section of the Act placed a $450,000 cap on damages which tort victims could recover for noneconomic losses.[123] The *Smith* court held that the particular provision of the Act which was at issue violated the victim's constitutional right to access to the courts, which is guaranteed by the Florida constitution.[124] The court followed the reasoning of an earlier case, *Kluger v. White*,[125] in which it held that the legislature could not restrict a plaintiff's right of access to the courts by establishing a minimum amount below which the injured plaintiff could not sue.[126] The *Smith* court stated that there was no relevant distinction between the issue that *Smith* presented and the issue addressed in *Kluger*.[127] Furthermore, the court found that the statutory cap was not based on a legislative showing of "an overpowering public necessity for the abolishment of such right" and that a reasonable alternative remedy or commensurate benefit was not provided.[128]

Additionally, the *Smith* court addressed the argument that the legislature had not denied tort victims the right to access to the courts because it had not totally abolished a cause of action, but had merely placed a limitation on damages which may be recovered.[129] The court found this argument unconvincing, reasoning that the access to the courts provision must be read in conjunction with the right to trial by jury provision of the state constitution.

> Access to the courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for e.g., $1,000,000 has not received a constitutional

121. Smith, *supra* note 8, at 396.
122. Smith v. Dept. of Ins., 507 So. 2d 1080 (Fla. 1987).
123. FLA. STAT. § 768.80 (1986).
124. *Smith*, 507 So. 2d at 1087; FLA. CONST. art. I, § 21.
125. Kluger v. White, 281 So. 2d 1 (Fla. 1973).
126. *Id.*
127. *Smith*, 507 So. 2d at 1088.
128. *Id.* (citing *Kluger*, 281 So. 2d 1).
129. *Id.* at 1088, 1089.

> redress of injuries if the legislature statutorily and arbitrarily, caps the recovery at $450,000. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right. Further, if the legislature may constitutionally cap recovery at $450,000 there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1. None of these caps, under the reasoning of appellees, would "totally" abolish the right to access to the courts.[130]

Following similar reasoning, the Texas Supreme Court in *Lucas v. United States*,[131] recently responded to a certified question posed by the Fifth Circuit[132] concerning the constitutionality of a state statutory limitation on medical malpractice damages.[133] The court held that the statute, which limited damages to $500,000 exclusive of medical expenses, violated the open courts provision[134] of the state constitution.[135]

Construing the open courts provision, the *Lucas* court stated that a litigant must satisfy two criteria in order to succeed in a right to redress challenge.[136] "First, it must be shown that the litigant has a cognizable common law cause of action that is being restricted. Second, the litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute."[137] Finding the first criteria satisfied, the court stated that it has long been recognized by Texas courts that medical negligence victims have a "well-defined common law cause of action to sue for injuries negligently inflicted upon them."[138] The court indicated that the restriction posed by the cap was unreasonable and arbitrary[139] by stating that:

> In the context of persons catastrophically injured by medical negligence, we believe it is unreasonable and arbitrary to limit their recovery in a speculative experiment

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130. *Id.*

131. Lucas v. United States, 757 S.W.2d 687 (Tex. 1988).

132. The Texas Supreme Court's authority to answer questions of state law certified by federal appellate courts is of recent origin. Texas voters approved an amendment to the Texas Constitution in 1985, which became TEX. CONST. art. V, § 3-C.

133. TEX. REV. CIV. STAT. art. 4590, §§ 11.02, 11.03 (Vernon Supp. 1988).

134. TEX. CONST. art. I, § 13.

135. *Lucas*, 757 S.W.2d at 692.

136. *Id.* at 690.

137. *Id.* (citing Sax v. Votteler, 648 S.W.2d 661, 666 (Tex. 1983)).

138. *Lucas*, 757 S.W.2d at 690.

139. *Id.*

to determine whether liability insurance rates will decrease. Texas Constitution article I, section 13, guarantees meaningful access to the courts whether or not liability rates are high.[140]

One of the *Lucas* court's concerns was that no adequate substitute was provided by the legislature to enable an injured plaintiff to obtain redress for injuries.[141] Thus, following the reasoning of the Illinois case, *Wright v. Central DuPage Hosp. Assoc.*,[142] the court rejected the societal *quid pro quo* argument. The *Lucas* court recognized that limiting recovery solely in malpractice actions was held by *Wright* to be arbitrary. Such arbitrariness is part of the two-factor test which is applied by the Texas courts.[143]

While noting the legislature's concern in trying to solve the health care problems it perceived in the mid-1970's,[144] the Texas Supreme Court in *Lucas* agreed with the *Carson* court that it is neither fair, nor reasonable "to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."[145]

Thus, as demonstrated in *Smith* and *Lucas*, provisions in state constitutions which guarantee a right of access to the courts or a certainty of remedy for injury to person, property, or reputation, may provide grounds for a successful state constitutional challenge against damage limitation enactments.

D. The Right To Trial By Jury Challenge

Statutes which limit the dollar amount of damages that are recoverable by plaintiffs in medical malpractice actions may face the possibility of being declared unconstitutional because they violate the right to a trial by jury. One's right to a trial by jury in a federal civil trial is guaranteed by the seventh amendment to the United States Constitution.[146] However, the United States Supreme Court

140. *Id.* at 691.
141. *Id.* at 690.
142. *Wright*, 63 Ill. 2d 313, 347 N.E.2d 736.
143. *Lucas*, 757 S.W.2d at 691.
144. *Id.* at 692.
145. *Id.* (quoting Carson v. Maurer, 120 N.H. 925, 941, 424 A.2d 825, 837 (1980)).
146. *See* U.S. CONST. amend. VII.

has held that this constitutional right does not apply to the states through the fourteenth amendment.[147] Therefore, in a state court the constitutional right to a jury in a civil case must arise from the state constitution.

Both the state of Virginia's constitution and the federal constitutional right to trial by jury were analyzed in *Boyd v. Bulala*,[148] a federal diversity suit applying Virginia law. The United States District Court for the Western District of Virginia held that Virginia's medical malpractice cap[149] which limited recovery in medical malpractice actions violated both the state and federal constitutional rights to trial by jury.[150]

First, the *Boyd* court noted that in federal diversity cases, the federal right to a jury prevails.[151] Additionally, the court stated that the seventh amendment provides the right to 1) a jury determination of liability and 2) a jury determination of the extent of the injury by an assessment of damages.[152] Thus, the capping statute at issue was found to constitute an infringement of the fact-finding function of the jury in assessing damages.[153] A limitation of the performance of that function is a limitation on the jury's role and, since the seventh amendment guarantees the right to a jury as the fact-finder, such a limitation was held unconstitutional.[154]

The *Boyd* court further noted that while it had the power to set aside a verdict and order a new trial, a remittitur, or a judgment notwithstanding the verdict, it could exercise these powers only when there is a discrepancy between the evidence and the verdict.[155] The capping statute, however, required that the court enter a judgment for the capped amount when a verdict in the amount above the cap was supported by evidence.[156] Thus, the court found that the capping

147. *See, e.g.*, New York Cent. R.R. v. White, 243 U.S. 188 (1917).
148. *Boyd*, 647 F. Supp. 781, 672 F. Supp. 915.
149. VA. CODE § 8.01-581.15 (Repl. Vol. 1984).
150. *Boyd*, 647 F. Supp. at 789.
151. *Id.* at 788.
152. *Id.*
153. *Id.* at 789.
154. *Id.*
155. *Id.*
156. *Id.*

statute was in no way related to the procedures of remittitur, new trial, or judgment notwithstanding the verdict.[157]

Additionally, the *Boyd* court found that the right to a civil jury provided by the Virginia constitution is equivalent to the federal seventh amendment right.[158] In Virginia, "it is the province of the jury to settle questions of fact and this includes the question of damages."[159] Thus, it was held that the statute not only unconstitutionally violated the right to trial by jury guaranteed by the federal constitution, but it likewise unconstitutionally violated the similar provision of the Virginia constitution.[160]

Similarly, the Kansas Supreme Court, in *Kansas Malpractice Victims Coalition v. Bell*,[161] held that a state statute[162] setting a cap on the amount of recovery in medical malpractice actions and requiring annuities for payments of future economic loss unconstitutionally violated the right to trial by jury.[163] The statute in question limited noneconomic damages to $250,000 and total damages (including noneconomic and economic damages) to $1,000,000. In addition, any recovery for future loss was required to be invested in an annuity with regular payments to the plaintiff over a number of years.[164]

The state constitution of Kansas provides that "the right of trial by jury shall be inviolate."[165] Although the Kansas Supreme Court has held that a jury trial is only guaranteed in cases where the right existed at common law,[166] the right to trial by jury was found applicable here because "[c]ommon law allows for the recovery of damages for negligent injury."[167]

The *Bell* court found that the traditional role of the jury is to determine issues of fact. Therefore, since the determination of dam-

157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988).
162. KAN. STAT. §§ 60-3407 (Supp. 1987).
163. *Bell*, 757 P.2d at 260.
164. *Id.* at 255.
165. *Id.* at 258.
166. *Id.*
167. *Id.*

ages is an issue of fact, the court held that it is the responsibility of the jury to determine the damages.[168] By setting a limit on the recovery of damages, it was found that the statute restricted before trial the amount of damages available to those victims who are most severely injured.[169] Additionally, the court determined that access to the recovery that is received is also restricted by the annuity requirement[170] and stated:

> In other words, for a plaintiff who sustains massive injuries and to whom a jury awards $4,000,000, H.B. 2661 makes the determination that $1,000,000 is all the plaintiff needs. For a plaintiff who suffers any extreme pain and disfigurement, a limit of $250,000 is imposed. When the trial judge enters judgment for less than the jury verdict (as H.B. 2661 directs him to do) and orders an annuity contract, he clearly invades the province of the jury. This is an infringement on the jury's determination of the facts, and thus, is an infringement on the right to a jury trial.[171]

Furthermore, while recognizing the fact that the legislature has the power to modify the right to a jury trial through its power to change the common law,[172] the *Bell* court noted that any statutory modification must satisfy due process requirements and be "reasonably necessary in the public interest to promote the general welfare of the people of the state."[173] The court stated that one way to meet due process requirements was by *quid pro quo*, but it found that no adequate substitute remedy was made available to the injured plaintiffs by the legislature.[174]

The *Bell* court further stated that the statute was actually a preestablished, compulsory remittitur which forced a successful plaintiff to forego part of his jury award without his consent.[175] This contradicted the general rule that remittitur of damages for personal injury is proper only when the damages shock the conscience of the

168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 259.
174. *Id.* at 260.
175. *Id.*

court and even then only if the plaintiff has the option of accepting the remittitur or asking for a new trial.[176]

Thus, injured plaintiffs suing for damages as a result of medical malpractice in a state which caps damage awards may pursue a challenge based upon the state's constitutional guarantee of a right to a trial by jury. Whether or not such a challenge will be successful depends upon the judicial interpretation of the particular state constitutional provision.

II. Constitutional Challenges in West Virginia

Responding to a dramatic rise in the cost of medical malpractice insurance coverage and the diminished extent of that coverage,[177] the West Virginia Legislature passed the Medical Professional Liability Act[178] in 1986.[179] One of the provisions of the Act limits the amount recoverable as damages for noneconomic loss in medical malpractice actions to $1,000,000.[180] Noneconomic loss is defined by the Act as "losses, including but not limited to, pain, suffering, mental anguish and grief."[181] While the West Virginia Supreme Court has not had occasion to rule on the constitutionality of the provision, this Note will discuss the possible constitutional challenges to the provision.

A. Equal Protection And Due Process Challenges In West Virginia

West Virginia Code § 55-7B-8 may be challenged under equal protection guarantees based upon the fact that the provision distinguishes between tort claimants whose injuries were caused by medical malpractice and other tort claimants.[182] Furthermore, the

176. *Id.*

177. W. Va. Code § 55-7B-1 (Supp. 1988).

178. W. Va. Code § 55-7B-1 to -11. (Supp. 1988).

179. In the same year, the West Virginia Legislature also enacted the Government Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1 to -18 (1986 Repl. Vol.), following findings that the political subdivisions of West Virginia were unable to procure adequate liability insurance coverage at a reasonable cost. W. Va. Code § 29-12A-7(b) caps noneconomic loss at $500,000 in any civil action involving a political subdivision or any of its employees as a party defendant. *Id.*

180. W. Va. Code § 55-7B-8 (Supp. 1988).

181. W. Va. Code § 55-7B-2(g) (Supp. 1988).

182. W. Va. Code § 55-7B-8 (Supp. 1988).

provision distinguishes between medical malpractice victims whose noneconomic loss exceeds $1,000,000 and those whose noneconomic loss is $1,000,000 or less.[183]

The West Virginia Constitution does not contain an equal protection clause, but equal protection rights are guaranteed by the open courts constitutional provision[184] and the constitutional provision prohibiting special laws.[185] Additionally, the concepts of equal protection and substantive due process are inherent in the due process clause[186] of the West Virginia Constitution.[187] Whether a constitutional challenge would prevail under these guarantees depends largely upon the standard of review utilized by the West Virginia Supreme Court of Appeals in analyzing the statutory provision.

The standards of judicial review utilized by the West Virginia Supreme Court of Appeals are set out in *Cimino v. Board of Education*,[188] in which the court stated that:

> Whether a statute or governmental action violates the Equal Protection Clause is a determination made by the application of one of two constitutional tests. The more demanding test relates to statutes which impinge upon sensitive and fundamental rights and constitutional freedoms such as religion and speech. In order to uphold such a statute a reviewing court must find that a compelling state interest is served by the classification.
> In all other instances the unconstitutionality of a statute, challenged under the Equal Protection Clause, is subject to the traditional standard requiring that the state law be shown to bear some rational relationship to legitimate state purposes. Under this test, the court must consider whether the classification is a rational one based on social, economic, historic or geographic factors; whether the classification bears a reasonable relationship to a proper governmental purpose; and whether all persons within the classes established are treated equally.[189]

In accordance with those standards, the West Virginia Supreme Court of Appeals in *Peters v. Narick*[190] reviewed cases which held that classifications based upon race, alienage, national origin, and

183. *Id.*
184. W. VA. CONST. art. 3, § 17.
185. W. VA. CONST. art, 6, § 39.
186. W. VA. CONST. art. 3 § 10.
187. State *ex. rel* Harris v. Calendine, 160 W. Va. 172, 179, 233 S.E.2d 318, 324 (1977).
188. Cimino v. Board of Educ., 158 W. Va. 267, 210 S.E.2d 485 (1984).
189. *Id.* at 274, 210 S.E.2d at 490.
190. Peters v. Narick, 165 W. Va. 622, 270 S.E.2d 760 (1980).

poverty are suspect. Such classifications mandated the application of a compelling interest or strict scrutiny test. The court enunciated certain criteria which are indicative of the suspect classification.[191] "Classifications based upon a characteristic that is permanent, immutable, or a condition of birth have been held to be suspect. Likewise, a history of past discrimination and political powerlessness is significant evidence of suspectness."[192]

Medical malpractice tort victims do not possess as a class a permanent or immutable characteristic, nor have they historically experienced discrimination. Thus, it is clear that the capping statute in question does not create a suspect classification. However, in the absence of a suspect classification, a statute may still be subject to strict scrutiny under equal protection analysis if it infringes upon a fundamental right.

A full recovery in tort is not a right which is guaranteed by the federal constitution.[193] Although certain state constitutions specifically prohibit limitations upon recovery in personal injury actions,[194] the West Virginia constitution, like the Virginia constitution,[195] does not contain such a provision. Moreover, as the *Boyd* court reasoned that the right to a full recovery in tort is not a fundamental right under the Virginia constitution,[196] it is likely that the West Virginia Supreme Court of Appeals would make a similar ruling under West Virginia law. Thus, since W. Va. Code § 55-7B-8 neither creates a suspect classification, nor infringes upon a fundamental right, it would be inappropriate to subject it to a strict standard of judicial review.

It is possible that the West Virginia Supreme Court of Appeals would review the statute under some type of heightened or middle-tier scrutiny. However, this may be unlikely because the court thus far has declined to adopt a middle level of judicial review, even in

191. *Id.* at 631, 270 S.E.2d at 765.
192. *Id.*
193. *Boyd*, 647 F. Supp. at 787.
194. *Id.*
195. *Id.*
196. *Id.*

cases where the United States Supreme Court has done so.[197] Additionally, it is important to note that in those cases involving gender based classifications and classifications based on illegitimacy, the West Virginia Supreme Court of Appeals afforded those who were detrimentally affected more protection than the federal constitution guaranteed by requiring that the statutes be subjected to the strictest possible judicial scrutiny.[198] However, the court's reasoning for applying a higher standard of review than that accorded by the United States Supreme Court would seem not to be applicable in the present situation where a statutory cap on medical malpractice noneconomic damages is involved. This stems from the fact that classifications based on gender are regarded as suspect because gender is biologically permanent[199] and is an easily recognizable characteristic which, like race, can carry with it a stigma of inferiority.[200] This is exemplified by the fact that women have historically been the victims of discrimination.[201] Likewise, the court has held that a status of illegitimacy satisfies the stated criteria[202] because illegitimates acquire their label as a condition of birth and have in the past faced profound political and legal disabilities.[203] Therefore, because victims of medical malpractice possess none of these characteristics, it is probable that the West Virginia Court of Appeals would adhere to its two-tier constitutional inquiry and not afford the capping statute a middle-tier level of judicial review.

In light of the foregoing analysis, it is likely that the West Virginia Supreme Court of Appeals would find that the rational basis test is the appropriate level of judicial scrutiny to be applied when reviewing the capping statute. The provision may be considered an economic regulation, and thus the court would subject it to the liberal standard of review normally accorded to such regulations under equal protection analysis. This standard involves the deter-

197. *See Peters*, 165 W. Va. at 630, 270 S.E.2d at 754.
198. *See Peters*, 165 W. Va. at 634, 270 S.E.2d at 766; Adkins v. McEldowney, 167 W. Va. 469, 472, 280 S.E.2d 231, 233 (1981).
199. *Peters*, 165 W. Va. at 631, 270 S.E.2d at 763.
200. *Id.* at 631, 632, 270 S.E.2d at 764.
201. *Id.* at 632, 270 S.E.2d at 764.
202. *Adkins*, 167 W. Va. at 472, 280 S.E.2d at 232.
203. *Id.*

mination of whether the classification is a rational one and whether it bears a reasonable relationship to a proper governmental purpose.[204]

Thus, in order to review the capping statute under the rational basis test, it would be necessary for the court to examine the Legislature's purpose in enacting it. The Legislature has declared:

> That it is the duty and responsibility of the Legislature to balance the right of our individual citizens to adequate and reasonable compensation with the broad public interest in the provision of services by qualified health care providers who can themselves obtain the protection of reasonably priced and extensive liability coverage;
> That in recent years, the cost of insurance coverage has risen dramatically while the nature and extent of coverage has diminished, leaving the health care providers and the injured without the full benefit of professional liability insurance coverage.[205]

It therefore appears that the legislative goal behind the capping provision is to secure the provision of health care services by maintaining the availability of malpractice insurance at affordable rates. This would clearly be found to constitute a legitimate goal. Additionally, it seems clear that the West Virginia Supreme Court of Appeals would find that the medical malpractice cap is a rational means of achieving that goal and thus would uphold the statute under an equal protection challenge.

Similarly, the provision is likely to survive a due process challenge given that the same level of scrutiny is applied both when a statutory classification is challenged as a violation of due process and when it is challenged as a violation of equal protection.[206] The court has held that in matters of economic legislation the legislature must be accorded deference, particularly when a due process standard is applied.[207] However, legislation in economic areas may be invalidated on due process grounds if the "challenged legislation bears no rational relationship to the public health, safety, morals,

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204. *See* Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co., 328 S.E.2d 144, 154 (W. Va. 1984).

205. W. VA. CODE § 55-7B-1 (Supp. 1988).

206. Thomas v. Rutledge, 167 W. Va. 487, 494, 280 S.E.2d 123, 128 (1981).

207. *Hartsock-Flesher Candy Co.*, 328 S.E.2d at 149.

and general welfare of this State or where the statute impinges on some fundamental or constitutional right."[208] As noted under the preceding equal protection discussion, no fundamental or constitutional right is at stake with the capping statute. Furthermore, it is highly probable that the statute would be held rationally related to the public health, safety, and welfare of West Virginia citizens. Thus, a due process challenge to the statutory provision is unlikely to be successful.

B. The Right To A Jury Trial Challenge In West Virginia

An additional challenge to the capping statute that could be asserted is that W. Va. Code § 55-7B-8 interferes with the plaintiff's right to a jury trial. Since the seventh amendment's right to trial by jury in the federal courts has not been extended to the states through the fourteenth amendment,[209] it is necessary to examine the analogous provision found in the West Virginia Constitution.

Article III, section 13 of the West Virginia Constitution,[210] provides for an absolute right to trial by jury when the matter in controversy exceeds twenty dollars, provided that the right is expressly asserted.[211] The court has held that the language of the provision is mandatory and the right to trial by jury is fundamental.[212]

In a case where a plaintiff's noneconomic damages in a medical malpractice case may be limited by the statute, the plaintiff is afforded a right to a jury trial to determine issues of liability as well as damages. The question is whether the right to a jury trial provided by the West Virginia Constitution is violated when the jury's assessment of noneconomic damages is limited.

The statutory capping provision in question makes it discretionary whether the jury will be instructed that there is a statutory cap of $1,000,000 on noneconomic damages.[213] Thus, one of two possible

208. *Id.*
209. Letendre v. Fugate, 701 F.2d 1093 (4th Cir. 1983), *cert. denied*, 464 U.S. 837 (1983).
210. W. VA. CONST. art. III, § 13.
211. Matheny v. Greider, 115 W. Va. 763, 177 S.E. 769 (1934).
212. Stephenson v. Ashburn, 137 W. Va. 141, 145, 70 S.E.2d 585, 587 (1952).
213. W. VA. CODE § 55-7B-8 (Supp. 1988).

scenarios may arise during the course of a medical malpractice proceeding. First, the jury may receive an instruction concerning the limitation, which would preclude it from returning a verdict in excess of the cap. Alternatively, the jury may receive no such instruction and thus be permitted to determine an unlimited monetary figure for noneconomic damages. The court would then ignore any amount exceeding the statutory cap. The jury's role in West Virginia is to determine genuine issues of fact and a determination of damages is a genuine issue of fact.[214] Thus, either of these methods may be found to infringe upon the jury's fact-finding function in assessing appropriate damages.

The West Virginia Supreme Court of Appeals has held that "[i]n an action for personal injuries the damages are unliquidated or indeterminate in character and the assessment of such damages is the peculiar and exclusive province of the jury."[215] Regarding noneconomic damages, the court has stated that:

> There is no exact formula or standard for placing a money value on such matters as pain, suffering, and mental anguish resulting from personal injuries or embarrassment resulting from bodily disfigurement or scars. The law recognizes that the aggregate judgment of twelve duly selected and properly qualified jurors represents the best method yet devised for fixing the amount of just compensation to the injured plaintiff's in such cases.[216]

Although $1,000,000 may generally be considered just compensation for noneconomic damages in a medical malpractice case, the determination of what amount is just must be ascertained on a case-by-case basis by the triers of fact. Therefore, it would be difficult to find that an injured plaintiff whose noneconomic loss a jury determines to be $2,000,000 would be justly compensated if that amount was artificially limited to $1,000,000.

Alternatively, the statutory cap may in certain circumstances allow a plaintiff to be unjustly compensated by receiving an award in excess of what he or she might have been awarded had there been no statutory cap in existence. It is plausible that a jury could

214. McElwain v. Wells, 369 S.E.2d 230, 231 (W. Va. 1988).
215. Campbell v. Campbell, 146 W. Va. 1002, 1012, 124 S.E.2d 345, 352 (1962).
216. Sargent v. Malcomb, 150 W. Va. 393, 400, 146 S.E.2d 561, 566 (1955).

be informed of the statutory cap and be subconsciously persuaded to enter a judgment meeting that cap. However, if there had been no such limitation, one may suspect that the noneconomic award might have been substantially less. In this situation, an award which far exceeds the victim's noneconomic loss may be as unjust as a deficient award.

Regarding the merits of a right to jury trial challenge, an attorney general's opinion[217] written in response to a question posed by the president of the West Virginia Senate may be persuasive. The opinion states that "[a] proposed 'no-fault' insurance plan which would limit or prohibit recovery of damages for pain and suffering . . . would be unconstitutional as violative of Article III, Section 13 of the Constitution of West Virginia, as denying the right to have a jury assess the damages, this being part and parcel with the right to a trial by jury."[218]

Additionally, the West Virginia Supreme Court of Appeals may be persuaded by the argument recently made by the Kansas Supreme Court. That court indicated that the challenged capping provision was a statutory compulsory and pre-established remittitur which is contrary to the general rule.[219] The rule concerning remittitur in West Virginia is that the remedy for an excessive verdict is to set it aside and award a new trial, or give the successful party the option to release the excess or submit to a new trial.[220] Thus, such a statute may be viewed as forcing the plaintiff to forego part of the jury award without his or her consent.

It is important to note that one member of the West Virginia Supreme Court of Appeals has disclosed his view on the constitutionality of statutes which cap pain-and-suffering awards under a right to jury trial challenge. Dissenting from the majority in *Roberts v. Stevens Clinic Hospital, Inc.*,[221] Justice McHugh stated that while

217. 55 Op. Att'y Gen. 82 (1973).

218. *Id.* at 87.

219. See *supra*, notes 175, 176 and accompanying text.

220. Browder, Inc. v. County Court of Webster County, 145 W. Va. 695, 702, 116 S.E.2d 867, 871 (1960).

221. Roberts v. Stevens Clinic Hosp., Inc., 345 S.E.2d 791 (W. Va. 1986).

West Virginia Law Review, Vol. 91, Iss. 2 [1989], Art. 11

he did not wish to extend his dissenting opinion with a discussion of whether there is a need for "tort reform," such as "ceilings" on pain-and-suffering awards, such ceilings

> would not run afoul of the second sentence of W. Va. Const. art. III, § 13, because the ceilings would not constitute a legislative "reexamination" of facts (amount of damages) found by a jury but would merely place a limit in advance on the amount of damages to be found by the jury. There would be no substitution of opinion on the amount of damages.
> I express no opinion here on whether ceilings on pain-and-suffering awards in common law tort cases would violate the first sentence of W. Va. Const. art. III, § 13 or any other state constitutional provision.[222]

The second sentence in the constitutional provision provides that "[n]o fact tried by a jury shall be otherwise reexamined in any case than according to rule of court or law."[223] Justice McHugh stated that the cap would merely place a limit in advance on the amount of damages to be found by the jury and thus would not constitute a reexamination of facts.

When examining the capping statute in question, however, it appears that whether the jury will be instructed about the liability cap on noneconomic damages is a discretionary matter. Thus, the jury may not be so instructed and may return a verdict in excess of the cap. The court would then reduce the verdict to the statutory limit. This would appear to constitute a legislative reexamination of the amount of damages.

On the other hand, even if the jury is informed of the cap prior to assessing noneconomic damages, the cap will be an interference with the ultimate determination of facts by the jury. The cap may not be deemed a reexamination of the facts, only because the jury will not be permitted to return its actual determination if that determination exceeds the cap. Thus, a reexamination of the complete facts would not even be possible. However, even if it is arguable that the precise wording of the second sentence of the right to a jury trial provision may not be violated by the statutory cap, the

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222. *Id.* at 811 n.15.

223. The dissent was written prior to *Boyd*, 872 F. Supp. 915, and *Kansas Malpractice Victims Coalition v. Bell*, 234 Kan. 333, 757 P.2d 251 (1985).

cases interpreting the entire provision may persuade the West Virginia Supreme Court of Appeals to reason otherwise.[224]

C. *The Open Courts Challenge In West Virginia*

It is unclear if a challenge to the statutory cap under the open courts provision[225] of the West Virginia Constitution would be successful. Although as previously discussed this provision guarantees equal protection, this section will address the provision's guarantee of access to the courts.

The West Virginia Supreme Court of Appeals has stated that, if a physician commits malpractice, there is little doubt that the injured individual has the ability to exercise his rights under the State constitution and seek damages in a court of law.[226] Thus, one might argue in defense of the statute that the plaintiff seeking damages in a medical malpractice action is not being denied access to the courts, even though those damages may be limited. However, the West Virginia Supreme Court of Appeals may find this argument unconvincing as did the Florida Supreme Court in *Smith*.[227] The court in *Smith* held that access to the courts is granted for the purpose of redressing injuries and, when a plaintiff receives a jury award, he has not received a constitutional redress of injuries if the legislature statutorily caps the recovery at a significantly lower monetary amount.[228]

The West Virginia Supreme Court of Appeals was faced with a constitutional challenge under the open courts provision in *Wallace v. Wallace*.[229] Prior to that case, the common law actions for breach of a promise to marry and alienation of affection were statutorily abolished.[230] The court held that there was no merit in the plaintiff's contention that the statute which abolished the action violated the

224. W. VA. CONST. art. III, § 17.
225. W. VA. CONST. art. III, § 13.
226. McCrossin, Inc. v. West Virginia Bd. of Regents, 355 S.E.2d 32, 35 (W. Va. 1987).
227. *Smith*, 507 So. 2d 1080.
228. *Id.* at 1088.
229. Wallace v. Wallace, 155 W. Va. 569, 184 S.E.2d 327 (1971).
230. W. VA. CODE § 56-3-2a (Supp. 1975).

open courts provision of the West Virginia constitution. That constitutional provision was held as not applicable to apply to an action for alienation of affections or breach of a promise to marry because such action did not affect or relate to an injury to any person in his "person, property, or reputation."[231]

Unlike the factual situation in *Wallace*, medical malpractice does result in an injury to the person, and thus the open courts provision of the West Virginia Constitution would appear to apply. The court has held that "[o]ur constitution clearly contemplates that every person who is damaged in his person, property, or reputation shall have recourse to the courts to seek the redress of his injuries."[232] Thus, the question becomes whether one is entitled to "full" redress of his or her injuries, as determined by a jury.

At common law, a plaintiff injured by medical malpractice could maintain a cause of action and seek a damage award that was not limited in any way. Thus, the capping statute takes away from the plaintiff his or her common law right to receive any award for non-economic loss which exceeds the statutory cap. Analogously, the worker's compensation law takes from an employee his common law right to sue his employer for damages for negligence. However, in return for this loss the employee receives payment from a fund of limited or scheduled benefits for disability or death resulting from the employment relationship, regardless of any fault of the employer.[233] Thus, the employee is provided with a reasonable alternative to protect his or her rights to redress for injuries.

The West Virginia Supreme Court of Appeals has not explicitly stated that such a *quid pro quo* is always necessary whenever the Legislature alters the common law. However, the court may reason that it is necessary to determine, as the *Smith* and *Lucas* courts did in their access to courts analyses, whether an alternative remedy is available to the injured plaintiffs which would satisfy the state constitutional open courts provision.

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231. *Wallace*, 155 W. Va. at 579, 184 S.E.2d at 333.

232. *McCrossin*, 355 S.E.2d at 32.

233. Belcher v. Richardson, 317 F. Supp. 1294 (S.D. W. Va. 1970), *rev'd on other grounds*, 404 U.S. 78 (1981).

III. Conclusion

It is clear that the states disagree regarding the constitutionality of medical malpractice damage limitations. However, it is equally evident that the recent trend has led to the invalidation of such provisions.

The enactments that have been found unconstitutional have not been uniform as to the type of damages that are limited. Statutes capping economic damages as well as statutes capping noneconomic damages alone have failed to successfully overcome constitutional challenges.

While it appears that there is a trend toward invalidating such statutes, the fact remains that the United States Supreme Court has refused to render any decision in this area. Until it does so, the disparity in state court decisions is likely to continue. Thus, for states considering whether "to cap or not to cap," the constitutional question remains essentially unresolved.

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